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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 62

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,

Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.,

Respondents.

No. 63

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,

Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.,

Respondents.

BRIEF OF RESPONDENTS REORGANIZATION COMMITTEE IN REPLY TO BRIEF OF PETITIONER FIRST NATIONAL BANK OF CINCINNATI.

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Counsel for Respondents Reorganization Committee.

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Opinions of the Courts Below

The opinion of the District Court filed simultaneously with the entry of the final decree of sale is printed at pages 280-283 of the printed Transcript of Record. The opinion of the District Court filed in connection with the decree confirming sale is printed at page 463 of the Record. Neither of these opinions has been published. The opinion of the United States Circuit Court of Appeals for the Third Circuit is reported in 64 Federal Reporter (2d

Series) at page 847, *et seq.*, and appears in the printed Transcript of Record at pages 534-544.

Jurisdiction

The jurisdiction of this Court rests on § 240a of the Judicial Code as amended by Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A., § 347a).

Statement of the Case

Respondents do not consider it necessary to include in this brief any statement of the case beyond the following corrections of inaccuracies and omissions in the statement of the case as set forth in the brief of the petitioner, First National Bank of Cincinnati (*figures in italics referring to pages of said petitioner's brief*).

This suit did not result in a "perfunctory judicial sale in a manner studiously designed to effectuate a transfer of all of the assets of the Corporation to the nominee of the Reorganization Committee" (*3, 6*). The decree in its general provisions awards the final relief customarily granted under a creditors' bill (R. 283), but the District Court did not perfunctorily adopt the draft decree which was submitted by the complainants. The decree which was finally signed embodied numerous changes required by the District Court, and was entered only after three days of testimony (R. 133-269), a full day of legal argument, and approximately two and a half months of further consideration by the District Court (R. 283). The decree required notice of the time and place of sale and of the property to be sold to be published once a week for four successive weeks in newspapers in the cities of New York, Buffalo, Boston, Baltimore, Washington, Richmond, Trenton, Pittsburgh, Johnstown, Cincinnati and Chicago (R. 298) and directed the

property to be offered in parcels and then as an entirety (R. 300, 301) at public auction at the court house at New Castle, Lawrence County, Pennsylvania (R. 298). All who might be interested had every means of notice and every opportunity to bid.

The persons who made representations as to the value of the Corporation's assets in 1927 were not "the same interests as those sponsoring the reorganization" (*3, 10, 34, 47*). The Corporation and its bankers were the persons who made the representations in 1927 (R. 275), whereas two of the three individuals who formulated the Plan of Reorganization had nothing to do with the Corporation or its financing and were not connected with the Corporation until long after its organization and the issuance of its securities (R. 117, 225, 250).

The Plan of Reorganization of February 11, 1931, as will appear from an examination thereof, can not be called a plan "for the benefit of debentureholders and preferred and common stockholders" (*4*). On the contrary, it was a plan **primarily and predominantly for the benefit of the Debentureholders.** The preferred and common stockholders were wiped out, except for the very small interest in the equity given to the preferred stockholders and the option given to the common stockholders to acquire a minority interest in the equity by putting up a substantial amount of new money (R. 40, 41).

The decree appointing the Receivers did not enjoin suits (*5*), but only attachments and interferences with the property in the possession of the Receivers (R. 66).

William G. Heiner, one of the Receivers, was an attorney of Pittsburgh, who had had no relation whatsoever to the situation prior to his appointment by the District Court. After his appointment, he spent about three days a week

in the plant and offices of the Corporation, and devoted a large amount of time to a study of the Corporation's affairs (R. 256).

The statement is overstrong that "the business as an entirety was a demonstrated failure" (5). While it is true that the Corporation had an operating loss (after depreciation and Debenture interest) of over $4,000,000 during the three years preceding 1931 (R. 33), those years were all in a period when building construction, on which the Corporation principally depended for its business, was steadily diminishing (R. 190), and more than two of these three years were included in the great economic depression. Moreover, of this $4,000,000 only $1,818,036 represents loss from actual operations, the remainder being interest on the Debentures. It has not been "demonstrated" that the Corporation cannot be operated profitably under normal conditions.

When the Receivers were appointed, the Corporation had $1,257,381.59 in cash (6) (R. 521). If, however, it had paid its February and August 1931 coupons and had complied with sinking fund requirements, totaling $1,094,429.50, and had paid the $157,511.89 of other debt then unpaid (R. 248), the amount of cash left would have been about $5,500, and would have left nothing with which to satisfy the principal of the Debentures except buildings, machinery, inventory, accounts receivable and other assets which would not have been susceptible of liquidation at all or for but a small fraction of such indebtedness.

It is not true that "the respondents, without notice to the creditors, submitted to the District Court the final decree of sale" (6). Notice was given to all parties to the cause (R. 449, 450). The Trustee under the Indenture was one of the parties, in effect representing all Debenture-

holders, and was given notice. In particular, notice was given to counsel for the petitioner First National Bank of Cincinnati, although that institution was not at the time a party, and that institution as an intervener was present by counsel throughout the hearing extending from March 3rd to March 7th, 1932 inclusive, and again at the argument on March 14, 1932 and participated in the proceedings; and the decree thereafter entered was not made until May 31, 1932, after more than ten weeks' further consideration by the District Court.

It is true that the same counsel acted for the Reorganization Committee and for the Receivers (*6*). Such counsel acted for the Receivers, however, by formal appointment of the District Court, made on the Receivers' petition (R. 1). We submit that there was no impropriety in this, since the creditors were all of one class, to-wit, general creditors, and when their creditors' bill was filed the complainants Reorganization Committee were even then acting for the holders of over 90% of the Debentures, which represented most of the Company's indebtedness (R. 8-9).

It is true that plants and machinery were listed in the Receivers' inventory at $6,743,419.15, (*7*), but this figure was the Corporation's book value and was based on replacement costs of these properties as computed by Sanderson & Porter in an engineering appraisal as of December 31, 1926 (R. 248).

The petitioner refers to "an apartment house" as one of the assets embraced in the sale (*6*). The Record shows that this property, which was appraised at $133,000, was in foreclosure, subject to approximately $208,000 of mortgage debt, interest, taxes and other liens (R. 330), and that the Corporation had only a worthless equity of redemption left. The petitioner refers to the stock of National Steel Boiler

Company as an additional asset (*7*). The uncontradicted testimony was that this stock had no value whatever (R. 265, 266).

The petitioner assumes (*7*) that, prior to the entry of the final decree of May 31, 1932, there was some infallible test whereby the District Court could have assured itself that the sale conducted under such decree and at the upset price therein specified, would yield as much as would the procedure by piecemeal sale and liquidation suggested by the petitioner. As to this assumption, the least that can be said is, that the testimony made it perfectly obvious that the so-called liquidation suggested by petitioner was a precarious undertaking and that there was no means by appraisal or otherwise of receiving any assurance as to the results of such a process. The difficulties of successful liquidation are clearly and convincingly presented in Mr. Flershem's testimony (R. 226, 228, 230-240).

It is not true that the District Court "did not secure an appraisal and acted only upon the so-called opinion of the purchasers" (*8, 33*). It had before it an inventory of 235 pages, at book figures, of every asset the Corporation possessed. That inventory is on file as an original exhibit in the office of the Clerk of this Court. The District Court devoted about three days to taking testimony as to the value of these assets and the estimated net amount in cash which could be realized by a sale or liquidation of each. Two of the witnesses owned no interest in the Corporation, two were the Receivers themselves and only one of the witnesses as to value was a member of the Reorganization Committee. The District Court was also informed as to the market price of the Debentures on The New York Stock Exchange, not merely during the receivership (*35*), but for a period of a year or more preceding the receiver-

ship (R. 136). In short, the District Court itself made a very full appraisal.

The statement is not correct that the Plan provided that "the rights of the Debentureholders as creditors should as such be cut in half" (9). Under the Plan, practically the entire ownership and voting control of the New Company will belong to the Debentureholders (and other general creditors). So far as concerns the treatment of preferred stockholders under the Plan, their so-called "substantial share in the assets of the corporation" (9) will consist at the most of an aggregate of 22% of the common stock of the New Company (R. 358). The common stockholders of the Corporation, in addition to paying $1 for a warrant, must, upon exercise of such warrant, **pay $20 per share** for the new common stock. If and whenever the new common stock is worth $20 per share, the new securities which are given to Debentureholders will have a value of $1,400 for each $1,000 of the present Debentures.

It is true that under the Reorganization Plan the New Company assumes the obligations of the old Corporation owing to certain merchandise and service creditors (9). **Those creditors, however, are not preferred in any funds of the receivership estate,** and the amount of the indebtedness thus assumed was only $40,075.15 (R. 459, 462), comprising 396 claims averaging about $100 each, out of a total indebtedness of upwards of $12,000,000. The Plan does not contemplate, as the petitioner's brief states at page 48, "the payment of all the creditors, excepting only the Debentureholders and the International Heater Company, in full in cash," (R. 37) and it does not appear from the proceedings below "that this had been done" (R. 430-431) and, in fact, they have not been paid.

It is not correct that the fund of $300,000 paid in cash on

account of the purchase price was reserved for administration allowances (*10, 38*). It is in substantial part to be applied as the distributive dividend against $400,000 or more of claims of creditors (including petitioner) not participating in the reorganization (R. 307 and 310).

The capital structure of the New Company will not be $16,000,000 or anything like that amount (*10*), but only the $5,358,000 of Income Debentures plus whatever amount may be properly allocated to the **no par value** stock of the New Company (R. 37). Apparently the petitioner's computation assumes a wholly unwarranted capitalization of $115 per share for the **no par value** preferred stock and $20 per share for the **no par value** common stock of the New Company (R. 39, 40).

The petitioner's brief inquires at page 10 what there is "in the judicial touch which renders assets comparatively valueless when constituting a trust in the Court's hands, although of great value at every other moment". A partial though exaggerated answer is given at page 5 of the same brief, where the petitioner asserts that "the business as an entirety was a demonstrated failure". The fact is that the securities of the Corporation were issued in 1927 and that the values of the plants were replacement costs **as of December 31, 1926.** The District Court was considering the sales value of these properties **in 1932,** and in any event, if there is anything in the petitioner's contention that the business was a demonstrated failure, it is difficult to see how petitioner can consistently argue the feasibility of selling for any substantial sums, property which could not produce earnings.

It is not true that the result of the decree of sale is to continue the business in the hands of the same management under whose charge it was a demonstrated failure (*11*).

The Record clearly shows that the management of the New Company (Mr. John H. Waters) did not take active charge of the business of the old Corporation until February 1930 (R. 249, 250, 453), and surely no business losses subsequent to that date, when the economic depression had overwhelmed practically every industry in the country, can be considered as a reflection upon the present management or as a demonstration of the business's failure.

SUMMARY OF ARGUMENT

I.

Under the circumstances in which the Corporation found itself, insolvency was inevitable and its reorganization was desirable in the interest of creditors.

II.

The District Court was fully advised of the character and value of the Corporation's property and fixed an adequate upset price in a fair manner and after hearing all parties who wished to be heard, and the District Court did not err in confirming the sale at a price in excess of this upset price.

III.

No creditor had a right to piecemeal liquidation.

IV.

The Plan of Reorganization was fair and was not in contravention of any principle of law or equity.

V.

The District Court had power to enter the confirmatory decree of September 8, 1932.

ARGUMENT

I.

Under the circumstances in which the Corporation found itself, insolvency was inevitable and its reorganization was desirable in the interest of creditors.

National Radiator Corporation resulted from the merger of the properties of six independent companies engaged in the radiator industry (R. 137). The constituent companies had earned satisfactory profits (R. 278), and when the Corporation began business late in 1927, its prospects appeared to be bright (R. 275). Very shortly after the Corporation began operations, however, it encountered unfavorable business conditions (R. 138, 190). Its volume of sales was largely dependent on the amount of new building construction (rather than the then current activity of the stock market) and especially residential building, and as early as 1928 building construction began to decline (R. 138 and 190) and has continued to decline ever since. The year 1929 was not a good year in the radiator industry. In 1929 residential building construction declined about 30% below 1928; between 1928 and 1930 new construction of residential buildings declined approximately 60%; and by 1931 the reduction below the peak of 1928 was approximately 66% (R. 138, 190). As a result, from 1928 to the end of 1930, the Corporation lost over $4,000,000 (R. 139).

At the beginning of 1931, the directors considered the situation and decided that the affairs of the Corporation had reached a critical stage. Debenture interest was due

on February 1 and again on August 1. During the year sinking fund payments also were required to be made. The total of interest and sinking fund payments for that year would be $1,094,429.50. The Corporation had sufficient cash to pay these charges as they fell due. If, however, it used its cash for that purpose, it would have seriously impaired its necessary cash reserves. Moreover, having parted with all its cash to pay interest, it would have available to pay principal on over $10,000,000 of outstanding Debentures, only idle plants and machinery, which perhaps could not be converted into cash at all because of the depression, and accounts receivable, inventory and other assets, which could not be liquidated and converted into cash except at great loss. It seemed to the directors that if interest and sinking fund requirements should continue to be met in 1931 there must be certain insolvency, a default in interest, and acceleration and default in principal in 1932, and creditors would receive only a small dividend on the principal of their claims. It was obvious that there was no hope that the Corporation itself, that is its stockholders, could ride out the depression. Sooner or later, the Corporation must surrender unconditionally to its creditors. The question then arose as to the condition the Corporation would be in at the time of such surrender. The Corporation might continue to pay interest as long as the cash lasted and then surrender to its creditors merely an aggregation of idle plants and machinery deprived of all working capital; or interest payments might be stopped immediately, so that the enterprise might be surrendered to the creditors in the form of a going concern.

In that situation the directors decided as a matter of sound business judgment, that the best interests of all

securityholders would be served if interest payments were discontinued, so that the working capital might be conserved (R. 501). The fact is, and is plainly stated in the Reorganization Plan, that National Radiator Corporation omitted the payment of interest on its Debentures because its management was firmly convinced that the liquidation of the Corporation would prove disastrous to creditors and that its cash must be conserved, if the enterprise were to be continued as a going concern. Of course, the directors' decision to omit payment of Debenture interest as a means of continuing the business entailed the decision that the capital structure should be reorganized, but it is not true, as petitioner has suggested, that the interest payment was omitted to bring about reorganization. Reorganization was not an end in itself. It was resorted to only as a means of salvaging the maximum value of the assets of the Corporation for its creditors. If National Radiator Corporation had not discontinued payment of debenture interest, by this time, it would have entirely exhausted its cash resources. Certainly a debtor does not merit the accusation of bad faith, if, before becoming wholly penniless, it seeks to conserve its cash resources for the benefit of its creditors. Accordingly, the creditors were advised of the conditions existing and a Plan and Agreement of Reorganization was formulated by the Reorganization Committee. The course adopted by the management has had the approval of the holders of the overwhelming majority of the Debentures, which constitute most of the Corporation's indebtedness. By October 1, 1931, the holders of over 90% of the outstanding Debentures had signified their adherence to the Plan and had deposited their Debentures with the Reorganization Committee (R. 365).

In the meantime, certain Debentureholders had instituted actions at law upon their overdue interest coupons and others were threatened (R. 399). If these were allowed to succeed, the result would be a dissipation and waste of the Corporation's assets through execution sales of its properties piecemeal, with probably full payment to a few more diligent creditors and only a small dividend to those less diligent (R. 11).

Acting in the interest of the holders of over 90% of the Debentures, the Reorganization Committee, on October 5, 1931, filed a typical general creditors' bill, praying for a judicial sale of the Corporation's properties, and the appointment of Receivers (R. 6-14). This creditors' bill in its essence was in no wise different from any other suit brought by a creditor against his debtor to secure satisfaction by sale of his debtor's assets and, if necessary, himself to buy in the debtor's property at judicial sale.

Brown v. *Lake Superior Iron Co.* (1890), 134 U. S. 530;

American Mine Equipment Co. v. *Illinois Coal Corp.* (C. C. A., 7th Cir., 1929), 31 Fed. (2d) 507.

It is a "form exceedingly familiar", said District Judge Learned Hand in his opinion defining the evolution and propriety of a similar creditors' bill in

Luhrig Collieries Co. v. *Interstate Coal & Dock Co.* (S. D. N. Y., 1922), 281 Fed. 265.

The point is made that in the instant case, however, the suit was filed to aid in consummating the Plan of Reorganization. But the Plan of Reorganization, in its essence, is nothing more than an agreement among the creditors as to

what they propose to do, in case they become the purchasers of their debtor's property at judicial sale. The propriety of such a suit by a creditor or group of creditors certainly cannot be affected by the fact that they know and disclose, before they file their suit, what they intend to do with their debtor's property, if they should purchase it.

> *Conley* v. *International Pump Co.* (S. D. N. Y., 1915), 237 Fed. 286.

There is in the instant case not a single element which bears analogy to the abuses which were criticized by this Court in the case of *Shapiro* v. *Wilgus* (1932), 287 U. S. 348. In the *Shapiro* case, the receivership was a device, effectuated with the aid of one friendly creditor, by which the debtor hoped to hold his creditors at bay for an indefinite period until the debtor should be able, by gradual liquidation, to take care of his debts and save a surplus of $100,000 for himself. In the instant case, the overwhelming majority of the creditors instituted this suit for equitable execution against the property of their debtor, and their debtor interposed no obstacle or delay to their having prompt execution upon its property in satisfaction of their debt. A sale for the benefit of all creditors has actually been decreed and held **and all interest of the debtor in its property has been wiped out.**

It is the petitioners (in this and companion cases), constituting less than 2% of all the creditors, who object to the vigor with which the complaining creditors have pressed their remedies; and it is the wish of this small minority to hold more than 96% of the creditors at bay.

What has been done in the instant case comes wholly within the following approving language of the opinion of this Court in the *Shapiro* case:

"It is one thing for a creditor with claims against a corporation that is legitimately his debtor to invoke the aid of equity to conserve the common fund for the benefit of himself and of the creditors at large. *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 380. Whatever hindrance and delay of suitors is involved in such a remedy may then be incidental and subsidiary."

II.

The District Court was fully advised of the character and value of the Corporation's property and fixed an adequate upset price in a fair manner and after hearing all parties who wished to be heard, and the District Court did not err in confirming the sale at a price in excess of this upset price.

The Receivers were appointed October 9, 1931, and were directed to operate the business (R. 64-68). On January 2, 1932, two months prior to the final hearing, they filed their First Report (R. 82). This advised the Court of the results of their operations to November 30, 1931 (R. 85). Appended to their Report and by reference made a part of it, was an inventory of 235 pages showing in minute detail the assets of the Corporation and the values at which they were carried on the books. The First Report, including this inventory, is on file with the Clerk of this Court as an original exhibit.

The case came on for hearing, on the prayer for a judicial sale, on March 3, 1932. The Receivers' First Report,

including their inventory, was then on file with the Court. The Court, to inform itself as to the value of the Corporation's assets, as well as the merits of the case, took testimony for three days (R. 133 to 269), and heard arguments of counsel for the better part of another day.

The first witness before the Court was a specialist on values of securities. He testified that the Debentures of the Corporation had been listed on the New York Stock Exchange since their issuance in 1927, that their market price was around 20 about the middle of 1930, dropped in the latter part of the year to a low of 14, and that the highest price for that year was 25 (R. 134-136). He testified further that in 1931 the Debentures had a low of 11 and a high of 25⅞ (R. 136). It will be observed that these were prices prevailing at a considerable period prior to the receivership, which had not occurred until October 9, 1931. The witness also testified that in 1932, which would include the period of the receivership, the high was 14 and the low was 8 (R. 136). As the aggregate amount of the Debentures outstanding during the period prior to the receivership was about $10,700,000, the value placed by the investing public upon the entire assets of the Corporation, in the public market place, prior to the receivership, ranged from about $1,177,000 up to $2,675,000. The market prices prevailing after the receivership indicate an even lower valuation.

The Court also heard the testimony of its Receivers. One of them, Mr. Waters, described the Corporation's plants, assets and property in great detail (R. 139-142) and explained the difficulties of a piecemeal liquidation thereof over an extended period of time (R. 146). He testified that all the plants were essentially useful only for the production of cast iron boilers and radiators, and he stated

that the machinery could not be devoted to any other use and that the buildings themselves could be utilized only for jobbing foundry work and that even this would involve the installation of new machinery (R. 142-143). He expressed the opinion, giving his reasons therefor, that such a liquidation would produce about $2,195,000 in cash (R. 154). Mr. Heiner, the other Receiver, who had no connection with the Corporation prior to the receivership, expressed the opinion that the liquidating value of the assets was approximately $2,230,000 (R. 257).

Mr. John H. Waters, President of the Corporation, stated that he and his family held over $1,500,000 of the Debentures (R. 252). He explained the difficulties of a piecemeal liquidation (R. 251). His views on this subject should have been of great value because of his long experience in the radiator business, which had begun in 1893 and continued with only a comparatively brief interruption (1927 to 1930) to the date of the receivership (R. 249-250).

Another witness was Mr. R. B. Flershem. He is Vice-President of the Marine Trust Company of Buffalo, New York, and previously had been employed for 25 years by the American Radiator Company in capacities ranging from "cub salesman" to vice-president in charge of sales (R. 224). The American Radiator Company is the largest in the industry, and in the last year of Mr. Flershem's connection with it had sold nearly half of all boilers and radiators sold in the United States in that year (R. 225). He did not own and never had owned any interest in the Corporation (R. 231). Mr. Flershem was a member of the bankers committees for Pierce, Butler & Pierce, large manufacturers of boilers and radiators, and Richardson & Boynton, a boiler manufacturer and jobber of radiators. It

would have been impossible to find anyone in this country better qualified to express an opinion as to the feasibility of liquidating the inventory of a radiator company which had ceased to do business. He expressed the opinion, with full explanation of the facts on which it was based, that the amount reasonably to be expected to be received on liquidation, in view of existing economic conditions, the expense of liquidation and other relevant factors, was $2,300,000 (R. 230). He pointed out that as soon as a policy of liquidation was inaugurated, the entire stock would be considered obsolete by the trade and would have to be sold at ruinous prices (R. 227-235), and he cited his own experiences with American Radiator Company to show the sacrifice and expense entailed in disposing of obsolete products. He pointed out the difficulties involved in the collection of accounts in the case of liquidation (R. 234).

The petitioner states, on page 8 of its brief, that the Court acted on the opinion of "the purchasers who wanted to buy the property as cheaply as they could". In point of fact, the Record shows that only one member of the Reorganization Committee, Mr. Flershem, was a witness as to the value of the property and he did not own any interest in the Corporation. Though the petitioner is very critical of the witnesses produced by the Respondents at the hearing, it has not suggested any others who would have been able to give more accurate information or better assistance to the Court. The Court was ready to hear any other witnesses whom any interested party might have produced, but neither the petitioner nor anyone else produced additional witnesses. Under the circumstances, it was entirely proper for the Respondents to have offered testimony in respect of the upset price.

Palmer v. *Bankers Trust Co.* (C. C. A., 8th Cir., 1926), 12 Fed. (2d) 747, 754;
Equitable Trust Co. v. *Western Pacific Ry. Co.* (N. D. Cal., 2nd Div., 1916), 233 Fed. 335.

The petitioner contents itself with arguing strenuously that, because these witnesses may have had an interest or a predeliction in favor of reorganization, the Court must indulge in the conclusive presumption that the witnesses offered by the Respondents were disingenuous and that their testimony is worthless, that the true facts are entirely at variance with what these witnesses said and that the Court should have disregarded the testimony and should have accepted the petitioner's "*ex parte* assertions unsupported by testimony" as to the feasibility of liquidation and the value of the property.

The highest figure expressed by any witness as his opinion of the liquidating value of the assets of the Corporation was $2,300,000. The Court fixed the upset price at $2,500,000. The price actually bid was $2,550,000.

After the judicial sale which was held on August 8, 1932, and of which notice was duly published once a week for four successive weeks in newspapers of the cities of New York, Buffalo, Boston, Baltimore, Washington, Richmond, Trenton, Pittsburgh, Johnstown, Cincinnati and Chicago, the case again came on for hearing on confirmation of the sale and for consideration of the fairness of the Plan of Reorganization. The notice of sale itself, which had been published widely, in 12 newspapers in 11 cities, from the date of its first appearance gave more than 6 weeks' notice of the time and place of the hearing on confirmation set for the 18th of August, 1932 (R. 368). On the 12th of August, 1932, 6 days before this hearing, a

further notice of its time and place was published in the same newspapers in which notice of the sale previously had been published (R. 465), so that there can be no question but that all concerned had full opportunity to prepare for the hearing and to produce witnesses to show that the bid price was inadequate, if that were in truth the fact. Counsel for the petitioner First National Bank of Cincinnati again was present, but this time he again failed to produce any testimony as to the value of the property.

In fact, not once during the entire proceedings before the District Court, did petitioner state to the Court what petitioner considered a fair upset price. The only figure which petitioner ever suggested was the sum of $11,000,000 and this was characterized by the District Court as "so plainly extravagant as to make it worthy of little consideration". Now petitioner demands that this Court secure to the petitioner "the amount of the principal of the petitioner's indebtedness with interest, costs and disbursements, including counsel fees". In rejecting a similar demand, Judge SANBORN, of the Circuit Court of Appeals for the Eighth Circuit, said:

> "To sustain the contention of his counsel would result in his receiving the whole amount of his claim against the insolvent company and interest upon it in cash, while other creditors in his rank received only their just shares of the property in the stock of the reorganized company."
>
> *Phipps* v. *Chicago, R. I. & P. Ry. Co.* (C. C. A. 8th Cir., 1922), 284 Fed. 945.

Counsel for all the other petitioners were also present at the hearing on confirmation. Counsel for International Heater Company complained that he had not had notice

of the hearing on upset price and therefore had had no opportunity at that time to offer evidence on the value of the property. However, like all others interested, he did have ample notice of the time and place of the hearing on confirmation of the sale and thus had, on the proper occasion, the opportunity which he claims was previously denied him. Although he was actually present at the hearing on confirmation, he introduced no evidence whatever that the bid was inadequate. From this fact, the inference would seem to be that the purchase price was both adequate and fair.

Although the question of value in this case had been thoroughly considered by the Court at the hearing on upset price, the proper time and place for consideration of the adequacy of the bid was at the hearing upon confirmation of sale.

> *Guaranty Trust Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.* (N. D. Ill., E. D., 1925, 1926), 15 Fed. (2d) 434, 442.

In fact, a decree of sale without any upset price would have been proper, with the entire question of the adequacy of the purchase price left for determination at the hearing on confirmation of sale.

> *Provident Life & Trust Co.* v. *Camden & T. Ry. Co.* (C. C. A., 3rd Cir., 1910), 177 Fed. 854.

And at this point it is most pertinent to emphasize that, whereas all the contentions of petitioner as to upset price which were urged before the District Court at the hearings in March 1932, were based upon the financial condition of the Corporation as of December 31, 1931, the real question now involved in this case is not whether the upset price

was a proper bid for the properties as existing on December 31, 1931. The real question is whether the District Court erred in confirming the bid at the sale held on August 8, 1932, upon the basis of the assets as then constituted. The adequacy of this bid is of course to be determined by the condition of the property *at the time of sale.*

> *Guaranty Trust Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.* (N. D. Ill., E. D., 1925, 1926), 15 Fed. (2d) 434.

The evidence shows that there had been substantial changes in the condition of the Corporation between December 31, 1931, and the date of the sale. The financial condition of the Corporation as of June 30, 1932 (five weeks before the sale) is shown by the "Statement of the Receivers" filed with the District Court pursuant to Section 54 of the Decree of May 31, 1932. This statement is on file as an original exhibit with the Clerk of this Court. The following table shows the changes in current assets which had taken place between December 31, 1931, and June 30, 1932:

	December 31, 1931	*June 30, 1932*
Cash and equivalent	$1,830,000.	$1,570,000.
Inventory	1,634,905.	1,671,605.
Notes and Accounts receivable	858,000.	641,000.

The procedure in the District Court was orderly, formal and deliberate. The decree of sale and the upset price were based upon testimony of witnesses taken in open court and subjected to cross-examination by petitioner's counsel; and all objections by dissenting creditors were presented to the District Court by extended oral arguments and voluminous briefs and were fully considered by the Court. The hearings upon upset price were unusually thorough and extended and the Court itself acted as an independent and

impartial appraiser. With due regard to the principles laid down in the cases cited below, every effort was made by the Respondents to bring to the consideration of the Court not only the public's estimation of the Corporation's worth, as shown by the prices at which its Debentures had been selling, but also its present earnings and book values.

Central Trust Co. v. *Washington County R. Co.* (D. Me., 1903), 124 Fed. 813;

Equitable Trust Co. v. *Western Pacific Ry. Co.* (N. D. Calif., 2nd Div., 1916), 233 Fed. 335;

Fearon v. *Bankers Trust Co.* (C. C. A., 3rd Cir., 1916), 238 Fed. 83;

Simon v. *New Orleans, T. & M. R. Co.* (C. C. A., 5th Cir., 1917), 242 Fed. 62.

It is obvious, as this Court has had occasion recently to point out, that many factors are to be considered in the orderly and intelligent settlement of a decree of sale. But it is equally obvious, from a study of the cases and many unreported decrees, that there can be no hard and fast rule of what under the circumstances of the particular case will furnish adequate data. It is submitted, however, that in the instant case the District Court was furnished with all relevant and adequate data essential to the formulation of a fair and proper decree of sale. With particular regard to this aspect of this case, the opinion of the Circuit Court of Appeals states (R. 537):

> "We have at much labor studied and absorbed this record. A recital of the mass of facts and figures would add nothing to the decision of the case. It will be sufficient to say that, notwithstanding what on first view is a startling disparity between book values and market values we cannot find on the evidence that the learned Judge erred in naming the price in the order of sale."

Radiator and boiler plants are not saleable like ordinary chattels or real estate. There are only two sorts of persons who have any interest in purchasing such plants: one is a person with money who might wish to engage in the radiator or boiler business and the other is a person already engaged in such business who might wish additional plant capacity. The present excess of plant capacity in the country is a matter of common knowledge and judicial notice and if there were any persons interested in putting new money into the radiator or boiler business, they were afforded every opportunity to appear at the judicial sale and bid for any one or more of these plants.

No amount of testimony or appraisals by "independent experts" or any other specialist could have produced anything more than mere opinion as to what the properties could have been sold for through a process of deferred and piecemeal liquidation. Engineering appraisals based on reproduction cost new, less depreciation, are of course utterly worthless in determining what industrial properties, particularly idle plants, can be sold for; **and no appraisal can produce a buyer.**

The determination of the upset price and the confirmation of the sale by the District Court **was a determination of a pure question of fact** and presents no question of law for review by this Court.

Graffam v. *Burgess* (1886), 117 U. S. 180;
Charleston Mining Co. v. *United States* (1927), 273 U. S. 220.

III.

No creditor had a right to piecemeal liquidation.

Under Point I of its brief, the petitioner contends that it had an absolute right, and that there rested an absolute duty upon the District Court, to order a piecemeal liquidation, to be carried out over an indefinite period of time, if so many as *one* dissenting creditor should be of the opinion that this was the best way to proceed.

Petitioner refers in its brief to a so-called "normal liquidation". We submit that there is no such thing as "normal liquidation" in equity. The late Circuit Judge JULIUS M. MAYER, in an address before the Association of the Bar of the City of New York, published in "Lectures on Legal Topics", Vol. VI (New York: Macmillan & Co., 1929), p. 165, said:

> "The equity receivership is the physician who desires to cure the patient. . . . The underlying thought, the compelling motive of equity receivership is to save the business."

As a matter of fact, with the growth of extensive and highly organized enterprises, only through a sale of the debtor's property as an entirety can its essential value be preserved. The normal outcome of an equity receivership is reorganization. Liquidation is the rare exception. If liquidation were to be the normal outcome of all the equity receiverships which are now in process of administration in this country, if all these huge industrial enterprises were to be wound up, the destruction of capital values would be a national calamity. Even corporations in receivership have an economic and social value.

We concede that a court of equity having custody of the property of a corporation possesses discretion to discontinue the conduct of the business and to adopt a program of piecemeal liquidation. This course of procedure, however, involves a determination of a question of fact and would not have been justified in this case, unless the Court had had convincing evidence that such a course would have produced a larger net amount than would have been produced by the customary judicial sale to the highest bidder. In the instant case, the uncontradicted testimony was that piecemeal liquidation would produce less net proceeds than the price actually realized by the public sale. Unless the Court below was disposed, therefore, at the mere suggestion of counsel for petitioner, to incur the risk of overwhelming losses for more than 96% of the creditors by ordering liquidation against the expressed desires of these creditors, the proper course was to conserve and decree the sale of the Corporation's property as was done.

If there was any absolute right in the matter, it was a right in the complainants to have a prompt public judicial sale of all their debtor's assets; for the proceeding was in substance an equitable execution, and a creditor has a right to a prompt execution against his debtor's property.

Luhrig Collieries Co. v. *Interstate Coal & Dock Co.* (S. D. N. Y., 1922), 281 Fed. 265.

In the absence of any absolute right, courts quite properly have given consideration to the wishes of the large majority of bondholders, whose chief concern is to salvage their claims to the best advantage.

Fearon v. *Bankers Trust Co.* (C. C. A., 3rd Cir., 1916), 238 Fed. 83, at 87 and 88.

As against this right of the complainants, the petitioner suggests that the District Court should have experimented with the petitioner's theory of piecemeal liquidation, at the expense of 96% of the creditors, who felt that their best interests would be served by an immediate public judicial sale of all the properties of the Corporation in the usual manner. To say the least, there is grave doubt as to the right of the District Court to defer indefinitely a judicial sale of the properties of a debtor, in the hope that changing conditions will produce a better price. At best, it would have meant that the District Court was indulging in a mere speculation as to the future trend of economic events. As a matter of fact, this the District Court declined to do, saying very wisely in respect of the petitioner's contention that

> ". . . it is possible, and we hope, that conditions will improve in the near future, but in view of the fact that the expenses of the receivership are very heavy, and the operation of the defendant company is at a considerable loss, we feel it would be improper to undertake to exercise a gift of prophecy which has not actually been conferred upon us. Such attempt might well result in greater loss" (R. 281).

Reviewing this statement after more than eighteen months, it must be perfectly obvious that there has been no change of conditions which would have permitted the successful liquidation for cash of the idle plants and inventory of a defunct industrial enterprise with any greater advantage of the creditors or at a higher distributive share than provided for in the confirmed purchase price.

IV.

The Plan of Reorganization was fair and was not in contravention of any principle of law or equity.

In Point II of the petitioner's brief, the contention is made that the Plan of Reorganization is contrary to the principles enunciated by this Court in *Northern Pacific Ry. Co.* v. *Boyd* (1913), 228 U. S. 482.

The rule of the *Boyd* case briefly stated is that a reorganization will not stand as against creditors, if such reorganization permits stockholders to retain an interest and at the same time excludes creditors from participation in the reorganized enterprise on a fair and equitable basis.

In the instant case, the Plan provides that every creditor may participate in the reorganization on the same basis as every other creditor and the creditors as a body will be the sole owners of the reorganized enterprise except for the small amount of common stock which is given to preferred stockholders of the old Corporation. **The Reorganization Plan is fundamentally a creditors' plan.** To the Debentureholders (and other general creditors) it allots all of the New Company's senior securities, having the same preferential value as the present Debentures, and, in addition, 78% of the New Company's common stock. Thus, practically the entire ownership and voting control of the New Company become vested in the Corporation's general creditors who elect to participate in the reorganization. If, as the petitioner says at pages 9 and 44 of its brief, the Plan gives stockholders a "free ride", the preferred stockholders get their free ride in the caboose and the common stockholders get no free ride at all, but pay a fare to ride even in the caboose.

The petitioner attempts to belittle the fact that the holders of 96% of the outstanding Debentures assented to the Plan and intimates that this wholesale participation by several thousand securityholders was the result of blind, unintelligent gregariousness. We have no means of knowing the mental processes of these thousands of securityholders, but we may be permitted to believe that many of them gave the matter serious consideration and consulted with their own financial advisers. Undoubtedly a great many were influenced directly or indirectly by the judgment and advice of competent financial advisers or such services as Moody's Investors Service, which published in its Bulletins of February 17 and 18, 1931, its wholly disinterested recommendation of the Plan of Reorganization (R. 356).

The petitioner's other objection to the Plan is that the New Company is to assume and undertakes to pay in full the claims of certain merchandise and service creditors. It will be observed, however, that this payment in full is not to be made from the proceeds of sale or other fund of the receivership estate, but by the New Company, (that is, only at the expense of those creditors who join in the Plan). The amount due for services was negligible (R. 461). The claims for merchandise amounted to about $40,000 (R. 459, 462) out of a total indebtedness of upwards of $12,000,000 and were in number 396 (R. 459)—all open accounts of comparatively small amounts averaging about $100 each. Under such circumstances, the Reorganization Committee considered it wise to preserve good credit relations with the merchandise creditors and that it would enhance the good-will of the New Company if these merchandise claims were paid in full. Moreover, the expense and labor of issuing new securities for so many small claims was wholly disproportionate to their

small amount. The provision with respect to the handling of these claims was dictated by sound business considerations and plain common sense. The alleged preference means so little to any creditor in point of dollars as to be trivial. Contrary to the statement in the petitioner's brief, none of these claims has been paid. They have not been paid and will not be paid until the Plan is finally consummated.

V.

The District Court had power to enter the confirmatory decree of September 8, 1932.

It is well settled that an appeal from a judgment does not deprive the Court below of the power to carry that judgment into execution. The confirmatory decree of September 8, 1932 was merely a step in executing the final decree of May 31, 1932, which had directed the sale, and was fully within the power of the District Court.

Hovey v. *McDonald* (1883), 109 U. S. 150.
Davis v. *Mercantile Trust Co.* (1894), 152 U. S. 590.
Duncan v. *Atlantic, M. & O. R. Co.* (E. D. Va., 1880), 88 Fed. 840.
Gay v. *Hudson River Electric Power Co.* (N. D. N. Y., 1911), 190 Fed. 812.
Lesamis v. *Greenberg* (C. C. A., 9th Cir., 1915), 225 Fed. 449.

In these cases, United States Courts proceeded with confirmation of sale, notwithstanding the pendency of appeals.

It was, of course, the right of the petitioner to have a stay of execution, if the petitioner had been willing to comply with the governing statute (*U. S. Revised Statutes,*

§ *1001*). But this the petitioner refused to do. On appeal to the Circuit Court of Appeals, the petitioner filed a bond for costs only (R. 343), without filing any supersedeas bond. On September 13, 1932, the petitioner then applied to the District Court for a stay of execution which was refused (R. 476). The petitioner then, on September 15, 1932, made application to the Circuit Court of Appeals for a writ of prohibition or mandamus (Supp. R. 552). The prayer of its petition to the Circuit Court of Appeals was that, in view of the appeal, the Circuit Court of Appeals should enter an order prohibiting the transfer of the Corporation's property to the purchaser until the appeal had been decided by that Court. The petitioner declined, however, to file any further bond or to give any security against losses that might be suffered by the Respondents through continued receivership operation, and refused also to give any security that a better price or that any price at all would be obtained, if the sale already made should be set aside and a resale ordered. Under these circumstances, the Circuit Court of Appeals refused the stay (Supp. R. 564). The decision of the Circuit Court of Appeals subsequently rendered and its accompanying decree in all respects affirmed and approved the District Court's confirmatory decree (R. 534-544).

At page 50 of its brief the petitioner insinuates that the object of the Respondents in transferring the property to the purchasing New Company was to bring about a situation in which "the higher courts would be confronted with a *fait accompli*". That insinuation requires no further answer than the statement that the transfer was not made until after the stay applied for had been denied both by the District Court and by the Circuit Court of Appeals. The transfer was made then only for the purpose of en-

abling the New Company to conduct its business without the stigma of receivership; and, in view of the action of the Circuit Court of Appeals, there was no legal or moral reason why the rights and interests of 96% of the creditors should be jeopardized to await the outcome of the appeal of this petitioner.

Conclusion

From the filing of the bill of complaint on October 5, 1931, to the hearing on March 3, 1932, on the bill and answer and to fix an upset price, this petitioner never moved the District Court for the piecemeal liquidation for which it argues in its brief. For five months, with full notice of the receivership (R. 82), petitioner was content to see the properties operated by the Receivers. In short, petitioner has merely attempted to use the suggestion of liquidation as a lever to raise the upset price and to test the adequacy of the sale price by comparing this price with petitioner's own unsupported opinion of what might have been realized by a different procedure. It may be assumed, therefore, that the petitioner has never seriously sought for liquidation, but has been quite content to have the Corporation's property sold at execution sale, provided the sale price could be measured against its own theoretical liquidating values.

Moreover, the petitioner has never sought and does not seek now, equality of treatment with other creditors. Not only does the petitioner refuse to take the same thing that the creditors who adhere to the Reorganization Plan are taking, but neither will it take the same thing (viz., a dividend) that the non-assenting creditors are willing to take. At the end of its brief it frankly asks for a direction "that

this petitioner have a lien upon the assets" of the New Company "for the amount of the principal of this petitioner's indebtedness with interest, costs and disbursements, including counsel fees". Even after two years of litigation, it does not signify a willingness to apply its own method of realizing on the assets of its debtor and to take the risk of what its *pro rata* share of the proceeds then might be. What it asks for is that it alone be paid in full, with all its costs and expenses, while the other creditors are left to receive their *pro rata* share in the corporate assets, whether from the receivership estate or in new securities. "Equality is equity", and this petitioner does not seek equality but a preference. No creditor has a vested right to preferential payment.

Therefore, the decrees of the courts below should be affirmed.

Respectfully submitted,

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Counsel for Respondents Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation.

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